



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/769,628	01/25/2001	George B. Diamond	P/2790-71	5333

2352 7590 11/26/2003

OSTROLENK FABER GERB & SOFFEN
1180 AVENUE OF THE AMERICAS
NEW YORK, NY 100368403

EXAMINER

WEINSTEIN, STEVEN L

ART UNIT	PAPER NUMBER
----------	--------------

1761

DATE MAILED: 11/26/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/769688

Applicant(s)

DIAMOND ET AL

Examiner

S. WEINSTEIN

Group Art Unit

1761

— The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address —

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

☒ Responsive to communication(s) filed on 7/9/03

☒ This action is **FINAL**.

☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- ☒ Claim(s) 1-32 is/are pending in the application.
- Of the above claim(s) 6-14, 23-32 is/are withdrawn from consideration.
- ☐ Claim(s) _____ is/are allowed.
- ☒ Claim(s) 1-5, 15-22 is/are rejected.
- ☐ Claim(s) _____ is/are objected to.
- ☐ Claim(s) _____ are subject to restriction or election requirement

Application Papers

- ☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on _____ is/are objected to by the Examiner
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)-(d).
- ☐ All ☐ Some* ☐ None of the:
- ☐ Certified copies of the priority documents have been received.
- ☐ Certified copies of the priority documents have been received in Application No. _____.
- ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

*Certified copies not received: _____

Attachment(s)

- ☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). _____ ☐ Interview Summary, PTO-413
- ☒ Notice of Reference(s) Cited, PTO-892 ☐ Notice of Informal Patent Application, PTO-152
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948 ☐ Other _____

Office Action Summary

Claims 1-5 and 15-22 are rejected under 35 USC112, first paragraph as being non-enabling for the reasons previously given in the Office action mailed April 4, 2003, paper No. 9 in regard to the structural elements, i.e. the concave slope and the raised portion and their dimensional and functional relationship to each other. That is, it is not clear what the raised portion is raised relative to. Also, as previously noted, as disclosed the raised portion is to provide greater headspace for absorbing pressure increases, However, the increase in headspace due to a raised portion would be dependent on the geometry, and any changes thereof of the center concave portion. That is, if the depth of the concavity changed, either positive or negative, then the headspace volume would change and the raised portion may or may not increase headspace volume. Without some functional, dimensional relationship between the raised portion and the concave portion then the raised portion is nothing more than any conventional rigidifying element in a lid or bottom end. The amendment recites that the upper chime has a height above the top end and the raised portion has an upper surface, which is at least the same height as the upper chime. However, claim 1 also recites that either the top or bottom end has a concave slope but the top end has a raised portion. These recitations appear to be inconsistent with each other and the specification. The latter recitation appears to recite that the concave portion can be in a different end from the raised portion. Not only does there not appear to be any support in the specification for this relationship, since the raised portion is part of an end, how can the chime be at a height above the top end but the raised portion which is part of the top end be at least the same height of the chime? These comments also apply to claims 17 and 18.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

Art Unit: 1761

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 2, 4, and 15-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Diamond et al (5,804,237) in view of Knize (3,799,388) further in view of Creagan (3,105,765) and Shepard(4,560,080).

Diamond et al is relied on for the reasons detailed in the Office action mailed April 4, 2003. That is, Diamond et al discloses a thin walled sealed container for sterilized edible material and an inert gas wherein the container is maintained rigid by the pressure of the gas but being easily deformable in the absence of pressure, the container having top and bottom end with at least one end having a concave slope which end being of a material and thickness and shape such that it will retain a substantially concave slope before, during and after sterilization and will become convex only if additional gas pressure is generated due to bacterial action. The examiner notes, however, that applicant's specification does appear to disclose that the lid can temporarily flex outward during the sterilization process so that the language of the claim may not be entirely accurate. In any case, Diamond et al also further discloses a raised portion as also discussed in paper no. 9. Claim 1 now recites that the raised portion has an upper surface which is at least the same height as the upper chime. Applicant's specification does not disclose any specific reasoning for the particular dimensional relationship that the raised portion has a surface, which is at the same height or higher than the chime. As shown by Knize, it is conventional in the art to have ends with raised portions at least the same height, and in fact higher than, the chime. Creagan and Shepard disclose raised portions of ends which are not quite as high as the chime but come close. Therefore, since the art taken as a whole teach a wide range of raised portion /

Art Unit: 1761

chime dimensional relationships, in the absence of some functional relationship with some advantage therefrom, to have made the raised portion of Diamond et al equal to (or higher than) the height of the chime would have been an obvious matter of design. Cregan and Shepard et al also teach the raised portions could be flat(claim 18). The remainder of the claims are rejected for the reasons given in paper no. 9.

Claims 3 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 1 above, and further in view of Saunders (3,608,774) for the reasons given in paper no. 9.

All of applicant's remarks filed July 9, 2003. Paper no. 10 have been fully and carefully considered but are found to be moot since the rejection of claims 1, 2, 4, 15, 16 and 19-21 are no longer rejected under 35USC102 as anticipated by Diamond et al but has been changed to an obviousness rejection under 35USC103 in view of the amendment.

The newly cited art on the USPTO 892 forms are cited as pertinent art.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,

Art Unit: 1761

however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven Weinstein whose telephone number is 703-308-0650.

The examiner can normally be reached on Monday-Friday 7:00am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

S. Weinstein/lap
November 17, 2003


STEVE WEINSTEIN
PRIMARY EXAMINER 1761
11/24/03